

MEMORANDUM

TO: Members of P.L 86-272 Work Group
FROM: Brian Hamer
RE: Summary of April 30, 2019 teleconference
DATE: May 15, 2019

This is a high-level summary of the April 30 meeting (via teleconference) of the P.L. 86-272 Work Group. It is not intended to serve as minutes of the meeting but rather to highlight key matters that were addressed, in order to facilitate discussion at the next meeting to be held on May 17.

The meeting began with Chair Laurie McElhatton describing that portion of the recent MTC Uniformity Committee meeting¹ when the work of the P.L. 86-272 Work Group was discussed. She noted that I presented an interim report to the Uniformity Committee which summarized the work of the Work Group to date. She also noted that an informal poll of was taken with respect to the taxability of Scenario 3A, and that 40 Uniformity Group attendees voted that the activity was not protected by P.L. 86-272 and that 1 person voted that it was protected. (Both the interim report and a memorandum describing the various scenarios are posted on the Work Group's project page.)

Ms. McElhatton and I then described the various points and questions that were raised by attendees: whether it makes a difference, for purposes of the statute, if a live person or a bot provides a service; the meaning and applicability of the *di minimis* exception adopted by the U.S. Supreme Court in its *Wrigley* decision and specifically whether to look at each individual interaction between customers and a seller when assessing whether an activity is *di minimis*; the assertion by one speaker that taxability should not turn on whether a communication between a seller and customer occurs via telephone call, electronic messaging or some other web activity; and the question posed by another person whether a seller's immunity is defeated when Amazon takes returns on its behalf at an in-state facility.

The Work Group then discussed whether the activity described in Scenario 2D is protected by P.L. 86-272. This scenario reads as follows:

Scenario 2. Seller maintains a website offering for sale only items of tangible personal property. The products are complicated to use and purchasers often need post-sale assistance . . . 2D. Seller's website includes an interactive tool which allows customers to type in a question. In response, the system (with human intervention) either asks follow-up questions or provides an answer.

Participants noted that this scenario raises the question of whether it makes a difference, for purposes of P.L. 86-272, that an interaction occurs with a live person representing the seller or with a bot, with a number of participants stating that it should not make a difference. A vote was then taken on whether the activity described in Scenario 2D was protected by the statute. 8 participants voted that the activity was not projected; no one voted that the activity was protected.

¹ The meeting was held on April 25, 2019 in Denver, Colorado.

The Work Group then considered Scenario 2E, which reads as follows:

2E. Seller's website includes seller-sponsored "how to" videos and in some cases similar videos posted by its customers.

I stated that it should be assumed that these videos are available to anyone accessing the website. A vote on this scenario was taken. 4 members voted that the activity was protected by P.L. 86-272; 4 members voted that it was not protected.

The members of the Work Group then considered Scenario 2F, which reads as follows:

2F. Seller's website emphasizes that customers who purchase seller's products also will receive free lifetime support from the seller.

Participants expressed that lifetime support was a service and noted the relevance of whether or not there was a separate charge for this service. The Chair suggested that a vote on this scenario would be postponed until the Work Group's next meeting.